

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

**HECTOR MARTINEZ,**

**Plaintiff,**

**v.**

**UNITED STATES OF AMERICA,**

**Defendant.**

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**Case No. CIV-11-830-F**

**REPORT AND RECOMMENDATION**

United States District Judge Stephen P. Friot has referred this matter to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. § 636. This matter is now before the Court on Defendant's Motion to Dismiss (Doc. No. 184). Defendant seeks dismissal of Plaintiff's action based on Plaintiff's failure to make installment payments toward the filing fee owed in this case.

On July 26, 2011, Plaintiff was granted leave to proceed *in forma pauperis* and ordered to pay the full \$350 filing fee through monthly payments. Order, Doc. No. 4, at 1.<sup>1</sup> On August 19, 2011, an order was issued to the agency having custody of Plaintiff – the Federal Correctional Institution in El Reno, Oklahoma – concerning withdrawals to be made from Plaintiff's prisoner accounts. Order, Doc. No. 5. Plaintiff is no longer at that facility, and no subsequent orders have been issued to agencies having custody of Plaintiff. To date, Plaintiff has made three payments totaling \$61.84, with Plaintiff's last

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<sup>1</sup> Plaintiff was not ordered to pay an initial partial filing fee. *See* Order, Doc. No. 4, at 1.

payment occurring on December 30, 2011. Receipts, Doc. Nos. 7, 8, 13. Plaintiff currently owes \$288.16 of the total filing fee for this action. Receipt, Doc. No. 13.

Responding to Defendant's Motion, Plaintiff explains that he has been transferred among several federal facilities and requests that the Court issue an order to the agency currently having custody of Plaintiff – FCI Forrest City Medium in Forrest City, Arkansas. *See* Pl.'s Resp. to Def.'s Mot. to Dismiss, Doc. No. 192, at 3, 4, 5. Contemporaneously with this report and recommendation, the undersigned has issued such an order.<sup>2</sup>

That order does not, however, resolve by itself the question of Plaintiff's failure to make payments toward the filing fee owed by him. In this instance, the undersigned recommends that Defendant's motion that Plaintiff's action be dismissed for non-payment of the filing fee be denied. However, the undersigned warns Plaintiff, again, that ultimately it is his responsibility to ensure that the required payments are being made and the consequences for non-payment may include dismissal of the action. *See Cosby v. Meadors*, 351 F.3d 1324, 1326-27, 1333-34 (10th Cir. 2003) (affirming dismissal with prejudice as sanction after plaintiff's repeated failures to remit court-ordered payments despite available funds); Order, Doc. No. 4; 28 U.S.C. § 1915(b)(1), (2).

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<sup>2</sup> Plaintiff states that his funds, to the extent he receives any, are collected at a central location, the Federal Bureau of Prisons' "National Lock Box," and recorded in a computerized system. Pl.'s Resp. to Def's Mot. to Dismiss at 2. Plaintiff suggests that the Court also issue an order to the National Lock Box regarding Plaintiff's monthly payments toward the filing fee owed. *Id.* at 3, 4. The undersigned finds such an order unnecessary at this time.

## RECOMMENDATION

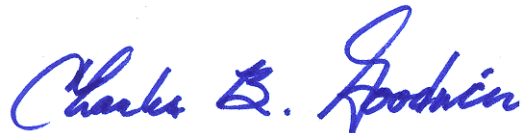
The undersigned recommends that Defendant's Motion to Dismiss (Doc. No. 184) be DENIED.

## NOTICE OF RIGHT TO OBJECT

The parties are advised of the right to file an objection to this Report and Recommendation with the Clerk of this Court by March 7, 2014, in accordance with 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72. They are further advised that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation does not dispose of all issues referred to the undersigned Magistrate Judge in this case.

ENTERED this 18th day of February, 2014.



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CHARLES B. GOODWIN  
UNITED STATES MAGISTRATE JUDGE